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ACHIEVING ANTIDISCRIMINATION OBJECTIVES THROUGH “SAFE HARBOR” RULES FOR CASES OF CHRONIC HIRING AVERSION^{*}

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INTRODUCTION

As a general matter, we have pursued antidiscrimination goals through standards rather than rules. This is understandable because discrimination is normally a motivation—or intention—based inquiry. In the employment context, the law does not bar employer discipline or staff reductions; these are routine activities that the law does not ordinarily take cognizance of. The law generally bars such employer actions only when they are improperly

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motivated. Improper motivation or intention acts as an impeaching factor.¹ In this manner, the tension between regulation and employer control of the workplace is cabined and minimized because discriminatory motives are thought to be counterproductive, simply unnecessary to achievement of legitimate business objectives. From the standpoint of employer prerogatives, the antidiscrimination command appears as a form of virtually costless regulation.

Similarly, hard-and-fast rules are not relied on extensively in anti-discrimination law. There are two principal reasons for this legal-design preference. First, rules may under-enforce and over-enforce either because the rules are set too leniently or are set too stringently. It is difficult for the legislator or other policymaker at the outset to determine what is needed to achieve the antidiscrimination objective and what roadblocks will be encountered. Especially where it is difficult to revise legislation once enacted, delegating standard-setting to an administrative agency promotes a mechanism for fine-tuning the regulation.² A second reason for preferring standards over rules is that rules will tend to make manifest the costs of regulation, that is, to highlight the interference with employer decision making that regulation entails. Such transparency may chill political support, and, hence, legislator willingness, to advance the regulatory scheme. From this political-economy standpoint, it may be far better to announce a standard— e.g., “thou shall not discriminate on the basis of race or gender, etc.”—and thus broadly delegate to the administrative agency or the courts the task of working out the actual rules through case-by-case determinations that will seek to control or influence behavior.

Some aspects of antidiscrimination law reflect a mix of both approaches. For example, the disparate impact theory, or what Europeans call “indirect discrimination,” sets a standard, not a rule, but one that is purportedly based on objective factors: does the employer practice have a disproportionate impact on a statutorily protected group, such as blacks or women, and, if so, can the

¹ See generally *Textile Workers Union v. Darlington Mfr. Co.*, 380 U.S. 263 (1965) (holding that although closing a plant is generally lawful, it can be unlawful if undertaken for the retaliatory purpose of chilling the rights of workers in other commonly-held plants); see also SAMUEL ESTREICHER & MATTHEW T. BODIE, *LABOR LAW* 72-79 (2016) (exploring motive-based violations with respect to employer discipline and business change decisions).

² This is ultimately the explanation for judicial deference to agency interpretation of their authorizing statutes. See, e.g., *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (outlining the factors for determining whether the administrative agency has the authority to issue a binding interpretation of its authorizing statute and under which circumstances such an interpretation would be reasonable). See generally Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 209; Samuel Estreicher, *Policy Oscillation and the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

employer demonstrate that the practice is job-related and justified by business necessity.³ The employer's good faith does not provide a defense and its good or bad motivation is generally irrelevant to the inquiry. Similarly, in the "bona fide occupational qualification" (BFOQ) context, the inquiry is based on the employer's motivation, but there is a strong presumption of a violation because the employer has been shown to have been motivated by an improper group classification.⁴ The BFOQ concept allows only a very narrow defense in limited circumstances where race, gender, or other prohibited characteristic may have an especially strong predictive power⁵ and where the "essence of the business" cannot be served by other means.⁶

These exceptions are few and far between. The dominant approach of antidiscrimination law is to establish a standard of nondiscrimination and to attempt to implement that command by motive-based inquiry in agency or court adjudications. Some agencies have rulemaking authority but the rules tend to be broadly framed without further specifying the regulatory command.⁷

I. COSTS OF RELIANCE ON STANDARDS VERSUS RULES

The system's preference for standards over rules, while understandable, brings with it certain costs. There are administrative costs because motivation-based inquiry is time-consuming and resource-intensive, often requiring a small

³ See, e.g., 42 U.S.C. § 2000e-2(k) (expressly authorizing the disparate-impact mode of challenge in a Title VII discrimination case); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing that Title VII of the Civil Rights Act of 1964 authorizes disparate-impact challenges).

⁴ See, e.g., 42 U.S.C. § 2000e-2(e) (allowing employers to use distinctions based on religion, sex, or national origin in circumstances where such distinctions are "a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise"); *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 189 (1991) (excluding women of child-bearing age from certain jobs involving exposure to lead held to be a form of sex discrimination that does not constitute a BFOQ).

⁵ The employer must show a "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Johnson Controls*, 499 U.S. at 207, quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234 (5th Cir. 1969).

⁶ See *Johnson Controls*, 499 U.S. at 203 ("[The concurrence] ignores the 'essence of the business' test and so concludes that 'the safety to fetuses in carrying out the duties of manufacturing as is safety to third parties in guarding prisons or flying airplanes . . . The unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing.'") (internal citations omitted).

⁷ Even though the U.S. Department of Labor has substantive rulemaking authority with respect to the Fair Labor Standards Act of 1938, it has tended in this area to rely on guidance or interpretations that do not have the force of law. See, e.g., *Freeman v. NBC Co.*, 80 F.3d 78, 82-86 (2d Cir. 1996). In 2004, the agency updated some of its wage-hour regulations to include some substantive rules. 66 Fed. Reg. 22,122 ff. (Apr. 23, 2004).

army of lawyers and witnesses, pretrial discovery, motion papers, and the time of judges and court personnel. It takes time for these processes to yield a judgment, thus raising the concern that “justice is delayed is justice denied.” Employee claimants who have not been hired or have been discharged will need to find a means of income in the interim; such income in our system will be deducted from any compensation award.⁸ As time passes, it becomes more difficult to reinstate even the wronged claimant. In the U.S., reinstatement is a remedy available only in statutory violation cases but is rarely awarded even there.⁹ In addition, the process requires lawyers. Unless the government agency agrees to use its limited resources to sue on the claimant’s behalf or a class action litigation can be fashioned, representation by a lawyer is doubtful in individual cases.¹⁰

There are also error costs in any regulatory system. Whenever a third party will make the ultimate decision as to whether the employer wrongly denied an individual a position or wrongly discharged that person from employment, there is a risk that the third-party decisionmaker will make a mistake and impose an unqualified or difficult employee on the enterprise (or require award of the financial equivalent of reinstatement). Error costs are likely to be magnified where the underlying factual issue is the elusive one of motivation, and where the law is in flux and even well-motivated employers may have difficulty anticipating and complying with the law’s shifting demands.

In many cases the employer lives with these costs and tries as best he or she can to hire qualified individuals, whether they are from protected groups or not. The employer does so for good business reasons. To avoid all hiring or promotion of, say, blacks or women, would be damaging to the business by depriving the employer of the benefits of an available, qualified workforce and by alienating customers from the same population groups or others who would withhold their patronage from a discriminatory employer.¹¹ The employer will

⁸ See RESTATEMENT OF EMPLOYMENT LAW § 9.01, Comments f-g (2015) (recognizing reasonable mitigation as an element of recovery in the event of an employer termination in breach of an agreement). The author of this article served as chief reporter for the Employment Restatement project.

⁹ *Id.* § 9.04, Comment c & Reporters’ Note to § 9.05, Comment e (awards of front pay in lieu of reinstatement in statutory violation cases). See generally Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343 (2014); Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985).

¹⁰ See generally BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016) (providing a general survey of the unmet legal needs of Americans with household incomes under \$50,000 a year and of programs that seek to address those needs).

¹¹ Where social forces help entrench racial or other group discrimination, employers are likely to refrain from hiring and promoting workers from discriminated-against groups. See

then do what he or she can to train the personnel/HR staff to select qualified workers who will fit well within the organization.¹²

As a general matter, regulation hastens this dynamic of integration of marginalized groups into the workplace by penalizing employers who discriminate against employees and job seekers in the protected categories. In this sense, regulation helps employers take advantage of qualified workers from these groups and build good will with customers from the same groups and others.¹³

II. CASES OF CHRONIC HIRING AVERSION

There are cases, however, where this dynamic does not work and non-utilization of individuals from certain protected groups is chronic. I have three examples in mind (though to be sure there are others): (1) individuals aged 50 and over who have worked for many years for a prior employer and are seeking new employment; (2) individuals with obvious disabilities requiring costly accommodations, such as hiring readers or purchasing special equipment; and (3) individuals with prior records of conviction for serious crimes.

In each of these (and perhaps other) cases, the employer will generally avoid hiring individuals from these categories even though such a hiring aversion is unlawful and there doubtless are individuals within those categories who will defy the predictions underlying these categories and perform as well as other employees. Most employers will avoid hiring individuals with these characteristics because the risks of being caught are very low and the costs of hiring employees from these categories who turn out to be problematic are higher and more enduring than in the usual case. Ironically, regulation of termination decisions in this context may worsen the employability prospects of these individuals.

For example, in the case of the unemployed older worker, we can assume that the individual performed adequately in the prior position but that the worker's likely fit in a new organization dealing with different tasks or

George A. Akerlof, *The Economics of Caste and of the Rat Race and Other Woeful Tales*, 90 QUARTERLY J. ECON. 599, 617 (1984) ("[T]he models of statistical discrimination and caste explain why economic rewards may favor those who follow prevailing social custom; and in so doing, they give economic reasons why such social customs may endure.").

¹² Assuming that, in these situations, agents of the employer strive to achieve the firm's objectives. But note that there will be situations where supervisors engage in discrimination even when contrary to the firm's policies.

¹³ Compare John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1412 (1986) ("[L]egislation that prohibits employer discrimination may actually enhance rather than impair economic efficiency."), with Richard A. Posner, *The Efficacy and Efficiency of Title VII*, 134 U. PA. L. REV. 513, 515 (1987) ("[T]o the extent that it is effective, Title VII may generate substantial costs over and above the costs of administering the statute . . . [and] Title VII may not be effective, in which event its administrative costs are a dead weight loss.").

technologies and reporting to younger supervisors is difficult to predict. If the employer makes a mistake and hires an older worker who turns out to be a problematic fit, it would be very difficult, as a practical matter, to terminate that worker's employment. Error costs are especially likely to be high in the case of a terminated older worker because the trier of fact is likely to indulge in a presumption in that worker's favor. Employers appreciate this risk, even if they are not unduly risk-averse, and will avoid hiring older workers.¹⁴

A second group involves individuals with obvious, difficult-to-accommodate disabilities. In the U.S., the law provides that the costs of accommodations cannot generally be considered in deciding whether to hire the disabled employees. The statutory duty is to treat alike disabled and non-disabled workers provided that the worker is qualified to perform the essential functions of position with or without reasonable accommodations.¹⁵ Costs of providing accommodations are not generally treated as cognizable under the concept of "reasonable accommodation"; cost considerations can come into play, if at all, only if the employer can establish the very difficult affirmative defense of proving "undue hardship."¹⁶ A good number of employers skirt the problem by avoiding hiring such disabled workers altogether.¹⁷

¹⁴ See RICHARD W. JOHNSON & JANICE S. PARK, CAN UNEMPLOYED OLDER WORKERS FIND WORK? (2011), <http://www.danangtimes.vn/Portals/0/Docs/12816436-Can%20Unemployed%20Older%20Workers%20Find%20Work.pdf> ("Workers age 50 to 61 who lost their jobs between mid-2008 and the end of 2009 were a third less likely than those age 25 to 34 to find work within 12 months, and those age 62 or older were only half as likely."); NATIONAL COUNCIL ON AGING, FACT SHEET (2016), <https://www.ncoa.org/wp-content/uploads/NCOA-Mature-Workers.pdf> ("Nearly half a million older adults aged 55- 64 and 168,000 aged 65+ who wanted to work in 2014 were unemployed 27 weeks or longer.").

¹⁵ Discrimination in violation of the Americans with Disabilities Act (ADA) includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the accommodation "would impose an undue hardship on the operation of the business" of the employer or refusing to promote an otherwise qualified individual "if such denial is based on the need . . . to make reasonable accommodation to the physical or mental impairments" of the individual. 42 U.S.C. § 12112(b)(5). The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

¹⁶ See 42 U.S.C. § 12111(10) (outlining elements of the "undue hardship" defense).

¹⁷ See Press Release, U.S. Dept. of Labor, Bureau of Lab. Stat., *Persons with a Disability: Labor Force Characteristics – 2015* (June 21, 2016), <https://www.bls.gov/news.release/pdf/disabl.pdf> ("The unemployment rate for persons with a disability was 10.7 percent in 2015, about twice that of those with no disability (5.1 percent)."); see, e.g., *Why is Job Opportunity Still Lagging for People with Disabilities?*, PBS NEWSHOUR (March 16, 2017), <http://www.pbs.org/newshour/bb/job-opportunity-still-lagging-people-disabilities/>; Abigail Abrams, *You're Autistic. You Know You Can Do a Good Job, but Will Employers Listen?*,

A third example of chronic employability problems is individuals with a history of prior conviction for a serious crime. Here, too, the costs of an employer mistake are especially large because employee theft or violence on the job will be especially costly. Most employers will avoid hiring such workers altogether.¹⁸

There are several possible responses to these hard cases. One response is to stiffen the penalty for employer noncompliance by increasing the level of damages that can be recovered, including, in the U.S., noneconomic and punitive damages. Relatedly, the level of enforcement can be increased by creating special bureaus with beefed-up resources for these categories of discrimination.

A second response is to use “carrots” rather than “sticks” say, by giving employers subsidies for hiring individuals from these categories or giving employees vouchers they can use to mitigate for the hiring employer some of the costs of hiring ex-convicts.¹⁹

These two modes of response are useful and should be encouraged but may be of limited reach. Presumably, existing resources, both financial and enforcement, represent what the government is willing or able to provide; more is not likely to be forthcoming any time soon.

WASH. POST (Sept. 24, 2016), https://www.washingtonpost.com/national/health-science/you-re-autistic-you-know-you-can-do-a-good-job-but-will-employers-listen/2016/09/22/412956bc-4dca-11e6-a422-83ab49ed5e6a_story.html; Associated Press, *Many Workers Still Reluctant to Hire Blind Workers*, NY DAILY NEWS (Nov. 4, 2013), <http://www.nydailynews.com/life-style/health/employers-reluctant-hire-blind-workers-article-1.1506358>. For a discussion on the difficulty of establishing a connection between enactment of the ADA and adverse employment outcomes for the disabled, see generally John J. Donohue III, et al., *Assessing Post-ADA Employment: Some Econometric Evidence and Policy Considerations*, 8 J. EMPIRICAL LEG. STUD. 477 (2011).

¹⁸ See generally STEVEN RAPHAEL, *THE NEW SCARLET LETTER: NEGOTIATING THE U.S. LABOR MARKET WITH A CRIMINAL RECORD* (2014); JOHN SCHMITT & KRIS WARNER, CENTER FOR ECON. & POL’Y RES., *EX-OFFENDERS AND THE LABOR MARKET* (2010), <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>; Claire Martin, *A Temp Agency That Gives Ex-Inmates a Job, and a Ride to Work*, N.Y. TIMES (Sept. 4, 2016), <https://nyti.ms/2kKxgOo> (describing the efforts of a temporary agency to match former convicts with permanent employment). Employer reluctance to hire individuals with poor credit history may be analogous, although the costs of an erroneous hire to the employer may be lower.

¹⁹ The Japanese government supports the continued employment of older workers through a combination of employer and employee subsidies and community centers. See JOHN B. WILLIAMSON & MASA HIGO, *OLDER WORKERS: LESSONS FROM JAPAN* 3-4 (2007), <http://dlib.bc.edu/islandora/object/bc-ir:104352/datastream/PDF/view>.

III. THE “SAFE HARBOR” APPROACH

A third response is for the responsible agency to promulgate “safe harbors” for employers willing to hire individuals from these categories of perceived high employment risk.²⁰ The safe harbor would be in the form of a regulation, promulgated after notice and opportunity for public comment, that individuals from these categories may be hired as probationary employees for a defined, say three-year, period, during which they may be discharged without cause or consequence for the employer under the law administered by the agency. All other provisions of the antidiscrimination and other employment laws would remain in effect. If such employees are retained beyond the probationary period, they will be treated the same as other employees in all respects.

The benefit of the safe-harbor approach is that it directly addresses the concerns that materially influence the employer’s non-hiring decision. The employer is given a relatively cost-free opportunity to evaluate whether

²⁰ In the U.S., many regulatory agencies have this authority but it is rarely exercised. *See* Title VII of the Civil Rights Act of 1964 § 713(b)(1), 42 U.S.C. § 2000e-12(b)(1) (“In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of . . . the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.”); Age Discrimination in Employment Act of 1967 § 7(e)(1), 29 U.S.C. § 626(e)(1), *expressly incorporating* 29 U.S.C. § 259(a) (“In any action or proceeding based on any act or omission on or after the date of the enactment of this Act . . . no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under [the specified laws] if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.”). *See generally* Alfred W. Blumrosen, *The Binding Effect of Affirmative Action Guidelines*, 1 LAB. LAW. 261, 266 (1985) (EEOC’s affirmative action guidelines are “the first and only EEOC guidelines to invoke the power of the EEOC under Section 713(b) to grant immunity from Title VII liability.”). *See also* Age Discrimination in Employment Act of 1967 § 9, 29 U.S.C. § 628 (“[The EEOC] may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.”). There does not appear a provision similar to §713(b) of Title VII or §§7(e)(1) or 9 of the ADEA in the ADA context. *Cf.* EEOC v. St. Joseph’s Hospital, Inc., 842 F.3d 1333 (11th Cir. 2016) (suggesting no “good-faith defense” to ADA liability). Absent inter-agency agreement, any EEOC-promulgated safe harbor would not extend beyond the laws and regulations under the EEOC’s purview.

engaging the employee from the perceived high-risk category will in fact entail the predicted risks or whether an employee's actual performance will belie the prediction.

Safe-harbor rules are increasingly being used in the employment areas, typically as a means of handling technical aspects of the legal regime, such as nondiscrimination testing to determine whether the coverage of an employee benefits plan disproportionately favors highly-compensated employees²¹ or navigating the "affordability" requirement for mandatory employee healthcare coverage.²² Some states are exploring safe harbor rules for dealing with whistleblower protections.²³ Also, the United States Supreme Court has introduced a form of safe-harbor approach in affording employers an affirmative defense to liability for sexual harassment by supervisors if they put in place internal processes for enabling employees to make complaints and promptly investigate and provide redress for meritorious complaints.²⁴

There are three principal objections to the safe-harbor approach. The first is the general concern we have already encountered that the standard may be set too low – that employers will be given a safe harbor when reliance on conventional antidiscrimination enforcement would yield the same antidiscrimination results. Stating the point in a somewhat different way, the concern is that the safe harbor will increase the incentive for noncompliance.

This objection has less force in the present context because the safe harbor would be available only for chronically unemployed or underemployed individuals in high-risk groups. Promulgation would occur only after considerable experience with conventional antidiscrimination enforcement.²⁵

²¹ 26 C.F.R. § 1.401(k)-3 (2013).

²² I.R.C. § 4980H (2015). This Section was added to the Code by §1513 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), *amended by* the Health Care and Education Reconciliation Act of 2010 § 1003, 42 U.S.C. § 1305 (2010).

²³ See TEX. ADMIN. CODE § 217.20(15) (2012) (requiring a "process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules" and explaining that "Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at any time during the work period when the initial assignment changes").

²⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (holding that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim."); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 734, 764-65 (1998) (arriving at the same conclusion as above).

²⁵ The objection to administrative agency opinion letters that are issued in response to hypothetical fact patterns would not apply. See, e.g., *Perez v. Mortgage Bankers Ass'n.*, 135 S.Ct. 1199 (2015).

The second objection is a moral objection – that a safe-harbor approach recognizes and legitimates discrimination against individuals in the perceived high-risk group who are qualified for the positions they seek. There is, of course, some force to this point but it must be kept in mind that the underlying objective of the law is to promote the employment or the “mainstreaming” of individuals from discriminated-against groups who are not participating fully in the workplace. If that employment is not occurring and conventional enforcement is not changing outcomes, we ought to be seeking approaches that will promote employability without undermining antidiscrimination values.²⁶

The third objection is based on the claimed inutility of the safe-harbor approach. Here, the argument is that employers will hire strategically to take advantage of the probationary period with no intention to retain these employees as potential regular employees at the end of that period. This is largely an empirical objection to be evaluated in the course of actual experience with safe-harbor induced probationary employment. In addition, it is difficult to understand what benefits would accrue to the employer in engaging in such a stratagem. Hiring a new employee always entails training and workforce-integration costs, which most employers will not want to incur unless they hope to recoup that investment over the course of sustained employment. Moreover, the proposal envisions an above-board, transparent program; participating employers would be operating under some measure of public scrutiny. And the government agency providing the safe harbor would take account of the employer’s record in deciding whether to allow that employer’s continued participation in the program.²⁷

This is a preliminary look at the potential benefits of a “safe harbor” approach to antidiscrimination goals. Creation of carefully cabined regulatory safe harbors for hiring employees from high-risk categories has the potential to spur improved utilization of such employees with limited harm to the moral force of the antidiscrimination regime.

²⁶ To minimize stigmatization, individuals would self-identify for participation in the program.

²⁷ These points also should serve to minimize the related moral and legal concern that participating employers would be given a privilege to engage in otherwise unlawful intentional discrimination when discharging these probationary employees.